United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1475

To be argued by
GEORGE E. WILSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1475

UNITED STATES OF AMERICA,
Appellee,

—v.—

MAX KAVALER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Max Kavaler appeals from a judgment of conviction entered on September 29, 1976, in the United States District Court for the Southern District of New York, after a 9-day jury trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment S. 76 Cr. 241,* filed on March 11, 1976, charged Kavaler in Count 1 with having conspired to defraud the United States in administering the Medicaid Act and to file false claims in connection with services

* Indictment S. 76 Cr. 241 superseded Indictment 76 Cr. 110, which had been filed on January 29, 1976 The earlier indictment contained 11 counts and concerned services allegedly rendered to only four patients.

allegedly rendered to patients, all in violation of Title 18, United States Code, Section 371. Counts 2 through 27 charged Kavaler with having presented false claims to the Government in connection with services allegedly rendered to 25 patients, in violation of Title 18, United States Code, Section 287. Counts 28 through 53 charged these same offenses as false statements in violation of Title 18, United States Code, Section 1001.

Trial began on July 19, 1976. After the Government had rested, the District Court granted a judgment of acquittal, with the Government's consent, on Count 3, 4, 7, 8, 12, 13, 14, 17, 20, 23, 24, 29, 30, 33, 34, 38, 39, 40, 43, 46, 49 and 50 as to which no evidence had been offered. Before the case was submitted to the jury, the Government elected to proceed on the false claim counts (Counts 2-27), not the false statement counts (Counts 28-53). This left Counts 1, 2, 5, 6, 9, 10, 11, 15, 16, 18, 19, 21, 22, 25, 26 and 27 for the jury. On July 29, 1976, the jury found Kavaler guilty of the conspiracy count, Count 1, and 13 of the 15 substantive counts.*

On September 13, 1976, Kavaler moved pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial. A hearing was held on September 17 and 23, 1976, after which the motion was denied in all respects.

On September 29, 1976, Judge Brieant sentenced Kavaler to concurrent terms of 4 years imprisonment on each of the fourteen counts.

Kavaler remains free on his own recognizance pending this appeal.

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* Kavaler was acquitted on Counts 19 and 25.

Statement of Facts

The Government's Case

A. Synopsis

The Government proved overwhelmingly at trial that Max Kavaler, a chiropractor, conspired with two other chiropractors, Joseph Ingber and Sheldon Styles,* to defraud the Medicaid program ** by submitting fraudulent claims for chiropractic services.

The evidence showed that in 1969, Kavaler, Ingber and Styles operated a chiropractic office in Jamaica, Queens, which did a significant amount of Medicaid business—most of it fraudulent. All three men submitted invoices bearing no relation to the actual treatment rendered. Typically, patients who had received only one or two treatments were represented to Medicaid as having been treated ten or fifteen times.

Not satisfied with only one office from which the public could be bilked, operations were expanded between 1969-70 to include three other clinics. In early 1971, however, alerted to a City investigation of other clinics owned or

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* On December 22, 1975, Ingber and Styles, the masterminds of a massive Medicaid fraud scheme that took place in New York City between 1969 and 1972, pleaded to six- and seven-count Informations, respectively, charging violations of 18 U.S.C. §§ 371, 287, 1001, 1341 and 2. In addition, Styles pleaded guilty to tax evasion in violation of 26 U.S.C. § 7201. Each was sentenced to imprisonment for a term of 5 years and is currently serving his term.

** Fifty percent of the program is funded by the Federal Government through HEW pursuant to Title XIX of the Social Security Act.

operated by Ingber and Styles, Kavaler disengaged himself from the other two men by trading his stock in two of the clinics in return for Ingber and Styles' shares in the third clinic, the Galler Medical Center in Brooklyn.

As the administrator of the Galler Medical Center, Kavaler continued to submit fraudulent invoices to Medicaid under his own name and encouraged at least one of his staff members, a podiatrist, to do likewise. In addition to the Galler clinic, Kavaler worked at another Brooklyn Medicaid clinic, the Lee Avenue Clinic, where he also submitted fraudulent Medicaid claims.

B. The Proof at Trial

1. Ingber and Styles Begin to Submit False Claims

In 1968, shortly after chiropractors were allowed to participate in the Medicaid program, Joseph Ingber, a chiropractor, began treating Medicaid patients. Almost from the start, in addition to legitimate claims, Ingber submitted fraudulent claims to Medicaid for services he had not performed. That same year, Sheldon Styles joined Ingber and almost immediately began to submit fraudulent invoices to Medicaid. In addition, Styles had an arrangement with an optometrist who ran a Medicaid clinic which had no chiropractor whereby, for a fee of five dollars per patient, Medicaid patients were sent to Ingber's office under the pretext of X-ray referrals. (Tr. 22-29, 181-82).*

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* References to "Tr." are to the trial transcript; "GX" to government exhibits; "DX" to defense exhibits; "Br." to appellant's brief; and "App." to appellant's appendix.

Business at the Jamaica office increased with the influx of referrals from the optometrist's clinic. Each new patient had a dollar value, depending on how many chiropractic visits Medicaid approved. Under existing regulations, chiropractors could not bill for over three visits without prior approval from the New York City Department of Health. To secure approval, a Treatment Plan, indicating the chronic nature of a patient's ailment and the need for extended care, had to be submitted. Depending on the persuasiveness of the request, usually anywhere from six to fifteen additional visits were approved by the City of New York. With approval in hand, Ingber and Styles proceeded to bill Medicaid for whatever number of visits were approved for each patient, even though most patients seldom returned for the full course of treatment. (Tr. 30, 183-84).

2. Kavaler Joins His Cohorts

Kavaler, a former instructor of Ingber and Styles at the Chiropractic Institute of New York and its Acting Dean in the final two years of the school's existence, had unsuccessfully tried to establish a private practice ever since the failure of the school. Early in 1969, he accepted an offer from Ingber to work a few days a week at his office. (Tr. 31-32, 964-65). During a conversation Kavaler had with Styles on his first day at work, Kavaler learned of Ingber's and Styles' scheme to submit fraudulent Treatment Plans and invoices to the Medicaid program. (Tr. 193-95).*

* Before Kavaler joined them, Ingber and Styles were receiving approvals for substantially fewer visits than they requested. They would request 12 visits and receive approval for 6, request 9 and receive approval for 4, *etc.* Ingber was elated

[Footnote continued on following page]

Kavaler contributed an erudite and sophisticated flair formerly lacking in the fraudulent Treatment Plans submitted by Ingber and Styles. Routinely, Ingber, Styles and Kavaler would retire to the back room of the office at the end of the day, where the three men sat around a table hammering out fictitious ailments for Treatment Plans for the day's patients. (Tr. 33-36, 186-87).*

Jenniene Vetrano and Barbara Cupola performed clerical and receptionist duties for the office. In the summer of 1969, they inherited the task of writing Treatment Plans and invoices. They were instructed to copy diagnoses and prognoses from stacks of old Treatment Plans onto new Treatment Plans, which were then submitted to Medicaid under the names of new patients. (Tr. 46, 195-96, 356-59, 409-11).**

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when Kavaler began to work at the clinic, because in addition to his ability to write convincing Treatment Plans, Ingber believed that, since Kavaler's cousin, Dr. Florence Kavaler, was a Deputy Commissioner in the New York Department of Health and highly placed in the Medicaid program, they would cease having difficulties getting their requested visits approved. (Tr. 83, 193).

* The scheme involved the submission of Treatment Plans for each patient who walked into the office, in most instances having no semblance to any real complaint of the patient, but convincing enough to receive approval for a high number of additional visits—usually twelve to fifteen. With these fraudulently obtained approvals in hand, invoices billing for these twelve to fifteen visits were submitted for payment, although in the overwhelming number of cases the visits never took place. (Tr. 34-36, 186).

** Cupola, who worked 3 days a week, testified that she completed an average of 75 Treatment Plans and corresponding invoices per week, meted out evenly to Kavaler, Ingber and Styles. Of these she estimated half were fraudulent. (Tr. 411-13, 424). Kavaler routinely observed Cupola as she prepared fraudulent Medicaid invoices for the chiropractors, including himself, as he walked about the office. (Tr. 417-18).

[Footnote continued on following page]

During the first months after Kavaler's arrival, arguments erupted amongst the chiropractors over the extent of fraudulent billing. Assured by Kavaler that the City had no means of cross-referencing invoices, Styles wanted to bill Medicaid to the hilt, whereas, Kavaler urged caution and fewer fraudulent submissions in order to avoid unnecessary attention. Ingber usually found himself negotiating a compromise between those two viewpoints. In no instance, however, did Kavaler object to the false billings *per se*, but only to overdoing it. (Tr. 39-40, 52-58, 189-90, 218-19, 233, 369-7).

3. Kavaler Becomes a Partner and Operations Expand

In April 1969, Kavaler became an equal partner sharing one-third of the Medicaid proceeds with Ingber and Styles. (Tr. 58, 196-97). The following month, Ingber, Styles and Kavaler expanded their operation by opening a Medicaid clinic in Corona, Queens. (Tr. 59).*

Styles set up the Corona clinic and ran it during its first two months of operation, hiring and training the secretaries and receptionists and implementing operating

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Vetrano testified that in late 1969 she and Cupola fabricated an appointment book to agree with all the visits for which fraudulent billings had been prepared. (Tr. 375-76). She further testified that based on the number of actual patients who came into the office, approximately 75 percent of the Medicaid billings submitted by Kavaler, Ingber and Styles were fraudulent. (Tr. 396-97).

* A stockholder's agreement dated May 1, 1969 (GX 25), signed by Ingber, Styles, Kavaler and two other stockholders, formed the 105-05 Northern Boulevard Corporation, the corporate home of the Corona clinic.

procedure, while Ingber ..ured the medical staff. In June 1969, Kavaler replaced Styles at Corona * when the latter moved on to set up the group's newest acquisition, the Galler Medical Center in Brooklyn. (Tr. 64-65).**

While managing the Corona clinic, Kavaler urged a fellow chiropractor, Dr. Arthur Krieger, to bill Medicaid for more visits than his patients actually made, but to be careful not to bill too often for 100 percent of the approved visits. He cautioned Krieger, too, against presenting piles of invoices that all looked the same and to vary the number of visits from invoice to invoice. (Tr. 435-36, 438).***

4. Kavaler Heads the Galler Clinic and Advises a Staff Member on False Billings

In late 1969, Kavaler became the permanent administrator of the newly acquired Galler Medical Center. Styles, after laying the groundwork at Galler, moved on to still another acquisition, the Queensbridge clinic in Long Island City. (Tr. 212-13).

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* Ingber testified that Kavaler's duties at Corona, among others, were to assure that patients were referred to as many doctors as possible, called "ping-ponging," and to make sure the clinic's Medicaid billings were kept up to a certain level. (Tr. 66).

** Kavaler, Ingber and Styles were equal shareholders in the 858 Flushing Avenue Corporation, which owned the Galler Medicaid Clinic (Tr. 67).

*** Krieger pleaded guilty before trial to a two count Information charging him with making false claims against the United States and conspiracy to do so, in violation of Title 18 U.S.C. §§ 287 and 371. On April 5, 1976, Kreiger was sentenced to three months imprisonment to be followed by two years probation.

In October of 1970, Kavaler welcomed a new staff member to the Galler Medical Center, a podiatrist named Elliott Martin. On Martin's first day, Kavaler showed him how to falsify treatment records and to bill for them. He cautioned Martin against billing for anything that could later be checked on by Medicaid—like X-rays or podiatric appliances—and to keep his billings "within safe limits." (Tr. 491-94, 499-501). Martin adopted these practices and continued them throughout his association with the clinic.*

5. The Testimony of Fifteen Patients Confirms Kavaler's False Filings

The testimony of fifteen patient-witnesses confirmed that Kavaler billed Medicaid for services far in excess of those he actually rendered.

Jasmine Arroyo, a former receptionist at the Lee Avenue clinic where Kavaler worked part-time, testified that Kavaler treated her for headaches on one or two occasions. She stopped going to Kavaler because his treatment made her uncomfortable. Kavaler billed Medicaid for 13 visits, claiming to have treated her for a back porblem (Tr. 456-60; GX 15, 15A);

Beatrice Lee, a former Galler Medical Center patient, saw a chiropractor on only one occasion, receiving an examination but no treatment. Kavaler billed Medicaid for eight visits for an ailment she never had (Tr. 582-86; GX 1, 1A);

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* Martin, who submitted fraudulent invoices right up to November 1975, pleaded guilty before trial to a two count Information charging him with filing false statements against the United States in violation of 18 U.S.C. § 1001 and with filing a false income tax return in violation of 26 U.S.C. § 7206(1). He was sentenced to concurrent terms of two months imprisonment.

Herman Pas only erceived chiropractic treatment on three occasions in his life. Kavaler billed Medicaid for 13 visits (Tr. 593-97; GX 8, 8A);

Alberta Harris stopped seeing Kavaler after being treated by him on four occasions, because she felt there was nothing physically wrong with her. Kavaler billed Medicaid for 25 visits (Tr. 612-14; GX 2, 2A, 3, 3A);

Rosa Rodriguez, who worked for Kavaler as a receptionist in 1972, testified that he terated her on only four occasions. Kavaler billed Medicaid for 11 visits. Additionally, she related that Kavaler asked her to tell Government investigators she "didn't remember" how many times she had been treated (Tr. 623-30; GX 5, 5A);

Another former employee of Kavaler's, Alice Rodriguez-Caro, testified that Kavaler treated her five times, the last treatment occurring two weeks before her wedding on July 16, 1972. Kavaler billed Medicaid for 10 visits, including visits for July 5th, 10th, 14th, and 22nd, 1972, the last date falling in the midst of Mrs. Caro's honeymoon (Tr. 640-44; GX 6, 6A, 44);

Carmen Rodriguez, a frequent Galler Medical Center patient who knew Kavaler as the clinic's administrator, testified that she was never treated by him or by any other chiropractor. Kavaler billed Medicaid in her name for 11 treatments for migraine, a condition she never had (Tr. 655-56; GX 7, 7A);

Minerva Rodriguez, after receiving one chiropractic treatment in early 1971 declined any further treatments because she was seven months pregnant and found the treatment uncomfortable. Kavaler billed Medicaid for 12 visits (Tr. 662-64; GX 12, 12A);

Maria Colon recalled receiving chiropractic treatments three times. Kavaler billed Medicaid for 11 visits in her name (Tr. 648-86; GX 11, 11A);

Rosa Echevarria was treated by Kavaler on eight or nine occasions duirng the course of one year. Kavaler billed Medicaid for 13 visits in a six week period (Tr. 695-700; GX 10, 10A);

Rachael Espinosa was treated twice by a chiropractor for backaches. She stopped her visits because her pains were no longer severe. Kavaler billed Medicaid for eight visits (Tr. 726-28; GX 13, 13A); *

Luz Quinones suffered back pains and saw a chiropractor two or three times. When she realized no results, and stopped her treatment, but Kavaler billed Medicaid for 9 visits (Tr. 735-37; GX 14, 14A);

Lucilda Creque testified that Kavaler treated her six times for back pain, but she stopped her treatments because she noted no improvement. Kavaler billed Medicaid for 13 visits (Tr. 743-45; GX 16, 16A); **

Ada Torres testified that she saw a chiropractor three times for low back pain. She stopped going when she felt no results. Kavaler billed Medicaid in her name for 12 visits (Tr. 751-53; GX 17, 17A);

Carmen Irizzary testified she went to Kavaler suffering from back pains. Kavaler treated her five times before her pains stopped and she stopped going to him. Kavaler billed Medicaid for 10 visits (Tr. 759-61; GX 18, 18A).

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* The jury acquitted on this Count.

** The jury also acquitted on this Count.

The Defense Case

The defense case consisted by and large of an attempt to convince the jury that Ingber, Styles, Cupola, Vetrano, Martin and Krieger were lying and that the fifteen patient-witnesses were either lying or mistaken. (Tr. 1123-49). The jury's verdict reflects the defendant's lack of success with this tactic.

A number of character witnesses were called by the defense. Four testified to Kavaler's character as they knew it from their relationship with him in and around his Cedarhurst, Long Island home and private office, but they had little, if any, knowledge of his Medicaid practice. (Tr. 882-915). Of the others, Rose Galler Levy, a stockholder of Galler Medical Center and the owner of the building in which the clinic was located, praised Kavaler's integrity. Dr. Sergio Allan, an internist who practiced at the Galler Medical Center from 1969-1971, testified about Kavaler's reputation for honesty, integrity and fair dealing and that Kavaler never suggested that he prepare false invoices. (Tr. 864-65). Two long-time Galler patients, Edith Rodriguez and Nilda Cordero, testified to Kavaler's good reputation among community residents. (Tr. 935-39, 950-52).

Kavaler took the stand in his own defense. He denied any knowledge of "pingponging" or "family ganging" * at the clinics with which he was associated. (Tr. 986-88). He also asserted that his discussions with Ingber and Styles over Chiropractic Treatment Plans were always academic and dealt in no way with attempts to defraud the Medicaid program. (Tr. 990-91). Finally, Kavaler flatly denied ever falsifying a claim, insisting that his invoices were entirely accurate. (Tr. 1022-24).

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* "Pingponging" is the practice whereby a patient is sent to every doctor in the clinic without regard to his or her complaint. "Family ganging" is the practice of having members of the family who accompany the patient also see the doctor. Both practices greatly increase billings.

Kavaler insisted that he had severed all connections with Ingber and Styles in March of 1971 after learning of their illegal activities. (Tr. 984-85). He further claimed that, after that date, neither Ingber or Styles had any say in the management of the Galler Medical Center. However, when shown 227 Galler checks dated from March 24, 1971 to February 9, 1972 bearing both his and Ingber's signature, Kavaler claimed that he had no time to delete Ingber from the bank account and an attorney had advised him that it was permissible for him to forge Ingber's name. (Tr. 1159, 1162, 1164).

Kavaler also claimed that the same attorney told him to lie to the New York City Department of Investigation by stating in a letter (GX 21) that at no time had Ingber and Styles asked him to do anything wrong nor had either he or they committed any unlawful acts. (Tr. 1190, 1238-44).

Kavaler then produced two log books purporting to be his own contemporary lists of all the patients he had treated during the period alleged in his indictment. The first book (DX AC) contained the names of patients allegedly billed from the clinic at 166A Lee Avenue; the second book (DX AD) listed Galler Medical Center patients. (Tr. 1045-48).* According to Kavaler, the Lee Avenue book (DX AC) ended in May of 1971 because he did not work there after that date. (Tr. 1104-05).

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* All of Kavalers records relating to his Galler Medicaid patients had been subpoenaed by a federal grand jury in 1974 (GX 55), and his Lee Avenue records were subpoenaed by the Government for trial (GX 56). Kavaler explained his failure to produce these documents pursuant to subpoena by claiming that he did not consider these logs to be within the scope of the subpoenas. (Tr. 10809-1100). He also stated that he misplaced the Galler log in 1971, finding it only a few months prior to trial. Therefore, it had been, according to Kavaler, unavailable when the subpoena was served in 1974. (Tr. 1101-05).

The Government's Rebuttal

Dr. Hamid Alizadeh, the administrator of the Lee Avenue Clinic, was called to establish that Kavaler had been connected with the Lee Avenue Clinic for a far longer period than the few months reflected in his alleged record book. He testified that based on the clinic's records, Kavaler had paid rent to the clinic through the end of 1973. (Tr. 1257-58; GX 71A-71G).

Gloria Silva, Dr. Alizadeh's secretary, who was called to identify the records, acknowledged, in substance, that she had seen Kavaler at the clinic during 1972 and 1973 and that he *might have* treated patients there.

ARGUMENT

POINT I

The Grand Jury Was In No Way Misled Concerning The Nature and Quality of the Evidence Presented.

Wisely eschewing any attempt to challenge the sufficiency of the evidence against him, Kavaler seeks reversal of his well-warranted conviction by attacking his indictment on the grounds that the grand jury was misled concerning the nature and quality of the evidence presented to it. More specifically, he contends that certain questions asked in the grand jury on January 29, 1976 by an Assistant United States Attorney and the responses of an HEW Investigator may have misled the grand jurors into concluding that certain patients who did not appear as witnesses in the grand jury but who had been interviewed by the HEW Investigator had previously

given sworn testimony to another body concerning the number of times they had received treatment from Kavaler. Similarly, for the first time on appeal, Kavaler claims that the grand jurors were again misled on March 11, 1976 when they were asked to return a superseding indictment based on the testimony of another HEW Investigator that the patients had been interviewed "in" the United States Attorney's Office.

Although we readily concede that the Assistant's questioning on January 29, 1976 was somewhat inartful, the claim that the grand jury was misled to the defendant's detriment is meritless. Moreover, the recent vintage of Kavaler's claim concerning the questioning of March 11, 1976 is only a partial reflection of its utter insubstantiality.

A. The Facts

On January 29, 1976, a special grand jury which had been impaneled in December, 1974, to investigate widespread Medicaid frauds returned indictment 76 Cr. 110, charging Kavaler with one count of conspiracy, four courts of making false claims to HEW and six counts of making false statements to the Government. The substantive counts of the indictment concerned filings dealing with the alleged treatment of four of Kavaler's patients.

Before voting upon this indictment on January 29, 1976, the grand jurors heard the testimony from Dr. Arthur Krieger on January 27, 1976 that Kavaler had participated in the filing of false Medicaid claims and had encouraged others to do so. (App. 48-86). On that same date, the grand jury heard the testimony of Dr. Ingber directly implicating Kavaler in a massive Medicaid fraud, and two days later, on January 29, 1976, the

grand jurors heard equally damaging testimony from Sheldon Styles, Kavaler's other former partner. (App. 487-511).

On January 29, 1976, the jurors also heard from HEW Investigator Charles Kenher.* Kenher testified that he had been detailed to assist the United States Attorney's Office in a Medicaid fraud investigation and that, during the investigation, he and his staff members had occasion to interview witnesses. (App. 467). He then testified concerning interviews by himself and staff members of Kavaler's patients.

The pertinent portions of Kenher's testimony are as follows (with those portions relied upon by Kavaler in italics):

> "Q. Were some patients treated by Dr. Kavaler interviewed?
>
> A. Yes, they were.
>
> Q. Rosa Linda Mendez. Is it a fact that Dr. Kavaler's invoices show three visits—let me withdraw that a minute.
>
> Now, Rosa Linda Mendez is not one of the patients named in Dr. Kavaler's proposed indictment, but is it a fact that independent evidence showed up on a computer run which indicated Dr. Kavaler had billed her for three visits?
>
> A. Yes.
>
> Q. And was she interviewed and stated that she had never seen Dr. Kavaler either at the Galler, G-a-l-l-e-r, Clinic or at this private practice?
>
> Yes, she did.

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* Kenher had previously testified on January 22, 1976. (App. 444-65). At that time, the Assistant United States Attorney advised the grand jurors that much of Kenher's testimony was based on hearsay and that the jurors if they wished, could hear from the original witnesses. (App. 464-65).

Q. Now, going to the people that are listed, Rosa Echevarria, E-c-h-e-v-a-r-r-i-a, was she treated at the Galler Clinic by a chiropracter?

A. I believe it's the practice on Lee Avenue.

Q. Was she treated by a chiropracter by the name of Napoli, N-a-p-o-l-i?

A. Yes, she was.

Q. And was she treated by any other?

A. No.

Q. And was she ever treated by—withdraw that.

And was an invoice submitted to the City by Dr. Kavaler for 13 visits?

A. Yes.

Q. And the 166 Lee Avenue address, is Dr. Kavaler's private practice?

A. Yes.

Q. Did Dr. Napoli work at that address, do you know?

A. Yes.

Q. Another interview was Carmen Irizarry, I-r-iz-a-r-r-y. Is it a fact that she *testified* that she went to Lee Avenue Clinic and saw one chiropracter there about five or six times?

A. She said she saw two chiropracters there for a total of about five or six times.

Q. One four more times than the other?

A. Yes.

Q. Is it a fact that Dr. Kavaler billed Carmen for ten visits?

A. Yes, he did.

Q. Another witness named Maria Colone [*sic*, should be Colon], how many times did she *testify* she saw Dr. Kavaler?

A. She said at the most she saw him three times.

Q. Was an invoice filed for treatment to Miss Colone [*sic*]?

A. Yes. Dr. Kavaler submitted invoices for eleven visits within a 34 day period.

Q. And she *testified* she didn't go to—never went to a chiropractor that often?

A. That's correct.

Q. Beatrice Lee went to a chiropractor, is that correct?

A. Yes.

Q. How many times did she go?

A. She went just once as a result of a ping-pong.

Q. She walked through a chiropractor's office?

A. Yes. She was urged to see the chiropractor.

Q. And did Dr. Kavaler submit an invoice for her?

A. Yes, for eight visits.

Q. Now, is there also some treatment plans which were submitted by Dr. Kavaler on all these people? Were there treatment plans submitted on Beatrice Lee?

A. I believe there was, yes.

Q. And Rosa Echevarria?

A. Yes.

Q. And both of these were—in the case of Rosa Echevarria, was a 13 visit invoice so there was a treatment plan for that, and Beatrice Lee—that's an 8 visit invoice, and there is a treatment plan for that?

A. Yes.

Q. And these treatment plans, show the diagnosis, do they not?

A. Yes.

Q. And do they indicate that those particular patients were examined and a plan of treatment was devised?

A. Yes, patient history is included.

Q. And do they appear to be signed by Dr. Kavaler?

A. They do.

Q. And does your investigation reveal these treatment plans were submitted to the City and approved?

A. Yes.

Q. Is there a stamp of some kind on the treatment plan which indicates it has been received?

A. Yes, there was a stamp from the Division of Medical Services, stamped received.

Q. And both treatment plans?

A. Yes, on the Lee and yes on the Echevarria.

Mr. Wilson: Mr. Foreman, will you excuse the witness, please?

The Foreman: You're excused." (App. 474-78).

The Assistant's use of the words "testified" and "testify" in his questioning concerning the interviews of Carmen Irizarry and Maria Colon, two of the four patients for whose alleged treatment Kavaler was charged in substantive counts, was somewhat ambigous, since the witnesses had been interviewed without being sworn. However, there was no suggestion in the prosecutor's questioning that Kenher was testifying to anything but his own or staff member interviews of the patients, and there was also no suggestion that Kenher had the capability or inclination to place Irizarry or Colon under oath. After Kenher had testified, the Assistant carefully advised the grand jurors for the second time that Kenher's testimony had been based on hearsay and that, if they wished, the patient-witnesses could be called upon to testify in in person:

"Mr. Wilson: As part of Mr. Kenher's testimony to be added onto the end of this testimony, I want to advise the Jury that Mr. Kenher's testi-

mony was based on hearsay, and you have the privilege as Grand Jurors to call for any or all of these patient-witnesses to come in and testify in person. You do not have to be content with taking testimony of one person as to what another person is not present or said as hearsay. Is there anyone who does not understand the explanation I gave?

Mr. Foreman, judging by the lack of no hands being raised, I take it everyone understands. Does anyone desire to have any witnesses called? If so, will you raise your hand.

Mr. Foreman, may I assume that no one desires any witnesses to be called?" (App. 482).

On March 11, 1976, superseding Indictment S. 76 Cr. 241 on which Kavaler was tried and convicted, was filed. This indictment re-alleged the conspiracy count of 76 Cr. 110 and contained identical false statements and false claims counts for each of the four patients named in 76 Cr. 110, along with additional substantive counts for twenty-two other patients.

The principal testimony leading to this superseding indictment was by Rena Morey, an HEW investigator in charge of Kavaler's case. She testified that she was presently assigned to the United States Attorney's Office and had assisted in the investigation by interviewing patients or examining the records of other patients who had been interviewed by other personnel. The relevant portions of Investigator Morey's testimony are as follows (with that portion relied upon by Kavaler in italics):

"Q. Miss Morey, you're connected with the United States Attorney's Office at present, is that correct? A. Yes.

Q. And have you assisted in the investigation of

Medicaid fraud involving, among others, Max Kavaler? A. Yes.

Q. In connection with your duties with the United States Attorney's Office, have you had occasion to interview various patients or to examine the records of other patients who have been interviewed by other personnel affiliated with the United States Attorney's Office? A. Yes.

Q. And have you determined that, with respect to Dr. Max Kavaler, there are a number of patients and a number of invoices which—well, that there are a number of invoices which are false, fictitious or fraudulent in respect that they reflect visits that did not occur or patients who were not treated at all by Dr. Kavaler? A. Yes.

Mr. Rosenthal: And will you mark this as Grand Jury Exhibit No. 160. [So marked]

Q. Looking at Grand Jury Exhibit No. 160, is that a list of the names of the patients and the invoice numbers for those people that you've determined, based on either your interview or the interviews of other people, who have not been seen by Dr. Kavaler the number of times indicated on the invoices reflected on that sheet? A. Um,——

Q. Let me rephrase that. You've got a list in front of you of invoices and patient names? A. Yeah.

Q. Those are patients that have been interviewed by you or other people in the United States Office? A. Right.

Q. And based on those interviews, have you concluded that the invoices listed next to those patients' names are false, fictitious and fraudulent in respect that there are more visits reflected on the invoices than patients actually had with Dr. Kavaler? A. Yes, except with some of them, they

weren't sure as to how many visits there were—just one or two—but they were sure they did not go as many as the times indicated.

Q. So with respect to all those patients, there are more visits reflected than actually occurred? A. Yes.

Mr. Rosenthal: Ladies and gentlemen, let me remind you again that portions of Miss Morey's testimony are hearsay, in that she's telling what other people declared, told her; and if you desire, you can subpoena the original declarants, the people that have first-hand knowledge of these matters. On the other hand, you're entitled to consider hearsay in connection with your deliberation." (App. 512-13).

When read in context it is abundantly clear that the Assistant's questioning of Investigator Morey and her response were not as Kavaler claims, meant to convey the impression that the interviews of the patients *took place in* the United States Attorney's Office, but rather to indicate that each interview was *conducted by persons who worked* in the United States Attorney's Office.

B. Judge Brieant's Decision

Two days after the trial of this case began, on July 21, 1976, Kavaler indicated for the first time that he objected to the evidence that had been presented to the grand jury.* No claim was ever made that the March 11, 1976 testimony was the slightest bit misleading. The

* Although the Government objected to the belated nature of this claim, see Fed. R. Crim. P. 12(b)(1), (f), Judge Brieant indicated that, in his discretion, he would entertain the claim. (App. 43).

sole claim that the jury had misled related to the Assistant's use of the words "testify" and "testified" on January 29, 1976. (App. 28-77.

After providing Kavaler's counsel a full opportunity to present his claim and after hearing the prosecutor advise the court that he had not intended to mislead the grand jury (App. 70), Judge Brieant denied Kavaler's motion to dismiss the substantive counts. The Court ruled that, although use of terms "testify" and "testified" on January 29, 1976 had been "inartistic," it had not misled the grand jury. Judge Brieant noted that any prejudice to the defendant was particularly unlikely, since, just before the grand jury returned the superseding indictment, it heard Miss Morey's testimony to the effect that each of the patient-witnesses, including Irizarry and Colon, had been interviewed by persons associated with the United States Attorney's Office. The six-week hiatus between Kenher's January 29, 1976 testimony and Miss Morey's March 11, 1976 testimony made it all the more unlikely that any reliance would be placed on the earlier ambiguous statements suggesting that the patient-witnesses had provided information to the investigators under oath. (App. 77).

C. Judge Brieant Did Not Err In Refusing to Dismiss The Indictment

We do not quarrel with the well-settled and salutary principle that the grand jury should not be deceived concerning the nature of the testimony it is being provided. See *United States* v. *Harrington*, 490 F.2d 487, 489-90 (2d Cir. 1973); *United States* v. *Ramirez*, 482 F.2d 807, 811-12 (2d Cir. 1973); *United States* v. *Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1972). What we do quarrel with is Kavaler's "Rube Goldberg" attempt to convert an inadvertent ambiguity in three questions asked by the prose-

cutor in the grand jury into a blot so infecting his trial as to require the reversal of his well-deserved conviction on fourteen felony counts.

The claim that Kavaler suffered any injury as a result of the March 11, 1976 testimony of Miss Morey can be readily disposed of. First, no argument was made below that Miss Morey's testimony in any way misled the grand jury. This fact not only constitutes a waiver of any claim based on that testimony, see *United States* v. *Marquez*, 462 F.2d 893, 896 (2d Cir. 1972), but also reflects on the claim's lack of substance. *Cf. United States* v. *Canniff*, 521 F.2d 565, 571-72 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). The insubstantiality of this belated claim is also disclosed by even a cursory reading of the allegedly amiguous remarks. Examined in context, it is plain that the prosecutor was merely asking Miss Morey whether people *working in* the United States Attorney's Office had interviewed the patients, not whether the interviews took place *at* the United States Attorney's Office. But even in the unlikely event that the question was understood in the latter sense, it is difficult to understand why the grand jurors would place any undue weight on the location of the interviews. It is far more likely that the reasons the grand jurors saw no need to require the personal appearances of the twenty-five patients were (1) that they had already heard Dr. Ingber, Sheldon Styles and Dr. Krieger testify under oath to Kavaler's involvement in a massive Medicaid fraud and (2) that they must have believed it extraordinarily unlikely that twenty-five patients would lie to Government interviewers about the existence of a dramatic disparity between the number of treatments they had actually received and the number for which Kavaler had billed Medicaid.*

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* The defendant was convicted on fourteen counts; only two of those counts related to these two patients.

Once Kavaler's arguments concerning the March 11, 1976 testimony are rejected, his claims concerning the January 29, 1976 testimony become patently meritless. For while it is true that three of the prosecutor's questions on that date were inartful, they could not possibly have tainted his conviction.

First, the ambiguous questioning related to only two of four patients referred to in the original indictment and only two of twenty-five referred to in the superseding indictment.*

Secondly, it is likely that the ambiguous remarks were not understood by the grand jurors in their prejudicial sense. The use of the terms "testified" and testify" were always tied to interviews by the HEW investigator and his staff. There was never any suggestion, as Kavaler would have it (see Br. at 10-11), that the patients had been questioned in the grand jury; and the grand jury, by the time it heard the HEW employee's testimony, was well aware that questioning in a grand jury was always conducted by Assistant United States Attorneys, not HEW investigators. Moreover, while the verb "to testify" certainly connotes statements under oath to an attorney, it is unlikely that the word would evoke quite the same automatic response in grand jurors, particularly when all the grand jurors were told was that the "testimony" occurred during an interview with an HEW employee and there was no direct statement that the witness had spoken under oath.

Third, as Judge Brieant ruled, the March 11, 1976 testimony of Miss Morey concerning the interviews of all

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* The grand jurors were advised that Miss Morey's testimony was hearsay and that, if they wished, they had the right to hear from the patients. See p. 22, *supra*.

twenty-five patients, in which there is contained no suggestion whatever that the patients had ever testified under oath, rendered it extraordinarily improbable that, in returning the superseding indictment, the grand jurors relied on the ambiguous suggestion in the January 29, 1976 questioning that two of the patients had testified under oath. The unlikelihood that the grand jurors relied on the earlier questioning is heightened both by the brevity of the ambiguous remarks and the six-week period between the original questioning and Miss Morey's testimony.

In the circumstances of this case, where the March 11, 1976 testimony of Miss Morey, exclusive of the January 29, 1976 testimony, was sufficient to support each of the substantive counts of the superseding indictment, there is no reason whatever to upset the defendant's conviction on any count. See *United States* v. *Harrington*, *supra*, 490 F.2d at 490. This is particularly so, since, had the patient-witnesses actually appeared in the grand jury, there is not the slightest reason to believe that Kavaler would not have been indicted. *Cf. United States* v. *Estepa*, *supra*, 471 F.2d at 1137, and cases cited therein.*

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* Judge Brieant correctly recognized that calling the patients before the grand jury would have had little effect, except to cause precisely the sort of inconvenience that this Court has recognized as justifying the use of hearsay in the grand jury. *E.g., United States* v. *Umans*, 368 F.2d 725, 730 (2d Cir. 1966), *cert. dism'd*, 389 U.S. 80 (1967). Judge Brieant stated:

> "You know, these [patients] are poor people, hardworking people, and those who don't work, they don't work, I assume, because they are incapable of working and they have their children and their lives to lead and it is not easy to go troubling them around for grand jury appearances. Here you have a total of about 25 or 26 counts and all those people are not available to the government even today. They can't drag in everybody to tell what they already told the investigator over the phone." (App. 55).

Finally, even assuming *arguendo* that this Court were to find that certain counts of the indictment should be dismissed because of the January 29, 1976 questioning, there is certainly no reason to dismiss counts which do not relate to patients Irizarry and Colon. Kavaler's spill-over argument, which extends that concept beyond any rational limits, must fail; for even assuming that the substantive counts relating to the January 29, 1976 questioning had been dismissed, the evidence concerning those patients would have been admissible as similar act proof demonstrating knowledge, intent, a common scheme and the existence of a conspiracy. See Fed. R. Evid. 404 (b); *United States* v. *Grady*, Dkt. No. 76-1201, slip op. 291, 302 (2d Cir., Oct. 27, 1976); *United States* v. *Stassi*, Dkt. No. 76-1110, slip op. 247, 251 (2d Cir., Oct. 26, 1976); *United States* v. *Flores*, 538 F.2d 939 (2d Cir. 1976); *United States* v. *Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Nathan*, 476 F.2d 456, 460 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States* v. *Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States* v. *Febre*, 425 F.2d 107, 113 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970).

POINT II

Kavaler Was Not Deprived of a Fair Trial By the Prosecutor's Failure To Correct False Testimony.

Kavaler argues, as he did unsuccessfully below in a motion for a new trial, that he prosecutor withheld knowledge acquired during trial of a material falsehood by a Government witness who desired to recant her

testimony. On the contrary, Judge Brieant correctly determined that the witness had not testified untruthfully and that the prosecutor had no reason to believe that she had.

A. The Facts

During his estimony, Kavaler produced a diary containing entries corresponding to the dates he claimed he had treated patients at the Lee Avenue Clinic. (DX AC). The entries, limited to the period February 10, 1971 to May 27, 1971, encompassed the counts of the indictment charging false claims for treatment at the Lee Avenue Clinic.

The prosecutor was immediately alerted to the likelihood that this document was a recent contrivance by the facts that (1) it conflicted dramatically with the testimony of the patients; (2) it had not previously been produced pursuant to earlier subpoenas to Kavaler for all medical records; (3) it looked quite new and the entries were remarkably similar in ink composition and handwriting; and (4) although it covered only a brief period, the entries corresponded to all of the alleged false claims from the Lee Avenue Clinic. (App. 437-38). Kavaler claimed that the reason the diary ended with a May 27, 1971 entry was that he had not worked at the clinic after that date. (App. 190).

In support of the contention that the diary entries were a recent creation, Dr. Hamid Alizadeh, the proprietor of the Lee Avenue Medicaid clinic, was called to testify. Dr. Alizadeh could not confirm with any degree of assurance that Kavaler worked at Lee Avenue in 1972 or 1973. He did, however, testify that Kavaler's last rent check was received by him in January, 1974

(App. 125) and that Kavaler could have treated patients as late as October, November or December of 1973. (App. 126). He admitted on cross-examination, however, that Kavaler might have worked there only in 1971. (App. 129).

Dr. Alizadeh's secretary, Gloria Silva, called chiefly to identify the clinic rent records for Kavaler and other doctors (GX 71A-71G)* acknowledged that she had seen Kavaler at the clinic during 1972 or 1973 and that he might have treated patients there:

"(BY MR. WILSON):

Q. Mrs. Silva, you know Dr. Kavaler, do you not?

A. Yes.

Q. Have you seen him around the clinic?

A. Yes.

Q. *Have you seen him on nights and days when he treated patients?*

A. *I seen him on days.*

Q. When do you recall was the last year you saw him?

A. The last time I saw him?

Q. Yes.

The Court: *The last time you saw him treating patients is what the question was.*

A. *I'm not too sure,* '73, '72.

Q. '72 or '73?

A. Yes.

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* These records show that Kavaler made rent payments for his own account on 4-1-71, 5-4-71, 9-22-72, 10-16-72, 11-2-72, 12-26-72, 12-28-72 and 3-13-73. (GX 71A). He had also made payments for a Dr. Winston on 8-10-72, 8-15-72, 2-6-73 (GX 71G) and 9-7-72 (GX 71A); and for a Dr. Newfield for an unspecified month in 1973. (GX 71C).

Q. The last payment you saw was January of '74. *Do you remember him treating patients then?*

Mr. Wilson: Your witness.

* * * * *

CROSS-EXAMINATION BY MR. ESBITT:

Q. You said could be, are you positive under oath that *you saw him* in 1973?

A. Yes, I did.

Q. And in '72?

A. '72, possibly.

Q. And '71?

A. '71, I did.

Q. You saw him in '71?

Mr. Wilson: No redirect. No further witnesses. We rest.

The Court: Anything else from you, Mr. Esbitt?

Mr. Esbitt: No." (App. 149-51) (emphasis added).

Contrary to Kavaler's contention (Br. at 25), the impression gained from Silva's testimony was that she had seen Kavaler at the clinic in 1972 and 1973, but was uncertain whether she had been working there during that period. (App. 438).

The next morning, based principally upon the Lee Avenue Clinic rent records showing that Kavaler had paid rent for his own account on eight seperate occasions from April, 1971 to March, 1973, and also upon the condition of the diary, as well as the equivocal testimony of Dr. Alizadeh and Mrs. Silva, the prosecutor, argued the inferences that either the diary had been prepared at the same time as the false invoices or had been recently contrived:

"The very key to Dr. Kavaler's defense, to justify or corroborate his testimony that all these treatments were his patient records, which Mr. Esbitt has there and which he will show you. Recall, if you will, that Dr. Martin testified that he saw Dr. Kavaler at one time sitting in an office with a pile of patient records and a pile of invoices and he was writing this paper, he just got out of factor and wanted to make money, and I suggest you may find, with little problem on this record in this trial, that everytime Dr. Kavaler wrote one of these false invoices he also wrote the patient record, which he testified as his private record, that he kept that just for a day like today, and that I think you may find is nothing more than bootstrapping.

I asked him a couple of times, 'Are these invoices as accurate as your patient records?'

'Yes.'

'Are your patient records as accurate as your invoices?'

'Yes, they are.'

'Were written at the same time.'

You recall the book for Lee Avenue, Defendant's Exhibit AC, which was apparently lost from the first subpoenas, January, 1972, December, 1974, and found some time after that and was not turned over with a subpoena back in July because Dr. Kavaler made the decision this didn't apply to patients.

What do we have? We have a book which has patients which begin on February 10, 1971, and end on May 27, 1971. The counts begin March 31, 1971, and end on May 7, 1971. Dr.

Kavaler testified when he was asked why was this so short that, well, he didn't work at Lee Avenue after May of 1971.

You heard the testimony of Dr. Alizadeh and his secretary, Mrs. Silva, they were receiving rent payments from him as late as January, 1974, and it was their best recollection that he worked there as late as December, 1973, and Mr. Esbitt has suggested to you, and will doubtless continue to suggest, that Dr. Kavaler was making rent payments for other people because he had these relationships with them where they were working for him really.

Also in evidence are the rent pages from these other doctors and you may inspect them and compare the dates and may find from looking at these that they all made their own rent payments and the rent payments on Dr. Kavaler's sheet are Dr. Kavaler's rent payrents because he worked there until late 1973. There is evidence of Dr. Kavaler's attempt to falsely explain why this record ends just a month—less than a month—after the last substantive count in the indictment.

I ask you to take this into the juryroom and call for it and look for it. Look at the condition of this book which is now five years old. The pages are all clean. They are not dogeared. Look at the entries that are made. In most cases, it appears that the name has been copied in rote, one after the other. When you write something down 20 times, look at the ink color of it, sometimes the ink is varied.

The same thing with the other book. The one that was also not turned over pursuant to three different subpoenas, and it appears the first time

at trial. Take a look at the names. Look at the books and decide for yourself whether these things are genuine articles. Even if they are the genuine articles and you assume that they are, it is just as easy if you were to write a false invoice and you were to write a false patient chart, you can make an entry in that book, too.

If you find that these entries were made at different times, I think you can find, at least, looking at the Lee Avenue book, it was made at one sitting, maybe with two or three different pens.

So, you have the right to examine that, and I ask you to do so and examine his patient records. In every case, you will find the patient record matches the invoice exactly." (Tr. 1340-44).

Immediately after the Government's summation-in-chief a recess was declared. (Tr. 1350). Dr. Alizadeh and Miss Silva appeared outside the courtroom with John E. Hartwig, a Government agent. (App. 314-15). Silva announced that, while answering questions asked the previous day by the "old man," * she believed Kavaler had worked at the Lee Avenue Clinic during 1972 and 1973. (App. 340). After she left the stand, however, she realized that she had mistakenly testified that she had seen Kavaler working during 1972 and 1973 at the clinic. (App. 328-29, 333-54, 357-58, 382-83). But when Silva reviewed a transcript of her questioning by defense counsel, it became clear to her that she had in fact testified only that she had *seen* Kavaler at the clinic in 1972 and 1973. (App. 335-36). The prosecutor then asked Miss Silva if she wished to see Judge Brieant and she said no. (App. 310). Relieved that she had not testified falsely, Silva left the

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* Referring to trial defense counsel who was approximately 30 years senior to the prosecutor. (App. 343, 382, 440).

courthouse. The prosecutor, believing that Mrs. Silva's present recollection was not at odds with her testimony the previous day, did nothing further. (App. 310).

B. Judge Brieant's decision

After the jury had returned its verdict, the defense moved for a new trial based on the claim that Mrs. Silva's trial testimony had been false and that her refreshed recollection of the events was newly discovered evidence. A hearing was held on September 17, 1976, during which Mrs. Silva, Dr. Alizadeh and the prosecutor, Assistant United States Attorney George Wilson, testified.

At the conclusion of the hearing, the Court found that Mrs. Silva had testified truthfully at trial. (App. 437). She testified, the court found, that she had seen Kavaler at the clinic during 1972, 1973 and 197 , but was uncertain whether he had been working when she saw him. Judge Brieant also found that, since there was a good deal of evidence, exclusive of Mrs. Silva's testimony, supporting the conclusion that the diary was a recent fabrication, such as the physical condition of the diary, the failure to produce it pursuant to subpoena, and its contradiction of the patients' testimony, Mrs. Silva's testimony, to the extent, if any, it supported the inference that Kavaler had in fact worked at the clinic after May, 1971, "was purely cumulative." (App. 438). In light of this finding, Judge Brieant concluded that, had Mrs. Silva approached him after the Government's summation, he would not have reopened the case to permit her to testify further. (App. 440).

The Court further found that this was not a case in which the Government had sponsored or relied upon perjured testimony and that, if Mrs. Silva testified further,

her testimony would have been "purely peripheral" and would not have altered the outcome of the trial, which, the Judge observed, turned on "overwhelming" proof that the patients had not received the treatments Kavaler claimed. (App. 439). Indeed, a clarification of Mrs. Silva's testimony would not, Judge Brieant concluded, have even affected the limited issue of the reliability of the diary. (App. 440).

Judge Brieant went on to say that, tested by hindsight, the prosecutor would have been better advised to have told defense counsel of Mrs. Silva's reappearance. However, the Court found that the prosecutor had acted properly in showing Mrs. Silva her testimony and had not intended to mislead her or "divert her from her desire to see the Court." (App. 440-41).

C. Judge Brieant's Findings Were Not In Error

Judge Brieant properly denied the motion for a new trial. A motion for a new trial based on newly discovered evidence is addressed to the discretion of the trial court. *United States* v. *Silverman*, 430 F.2d 106, 119 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971), *United States* v. *Lombardozzi*, 343 F.2d 127, 128 (2d Cir.), *cert. denied*, 381 U.S. 938 (1965); *Brown* v. *United States*, 333 F.2d 723, 724 (2d Cir. 1964). It "is not favored and should be granted only with great caution. *United States* v. *Sposato*, 446 F.2d 779, 781 (2d Cir. 1971); *United States* v. *Costello*, 255 F.2d 876, 878 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). The accepted criteria for the granting of a new trial on the ground of newly discovered evidence are (1) the defendant must satisfy the court that the asserted new evidence is such that it could not with due diligence have been discovered before or, at latest, at trial, (2) the evidence must be material to the factual issues at the trial and not merely

cumulative of evidence already introduced, and (3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial. *United States* v. *Polisi*, 416 F.2d 573, 576-77 (2d Cir. 1969). *Accord*, *United States* v. *Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975); *United States* v. *Schwartzbaum*, 527 F.2d 249, 254-55 (2d Cir. 1975); *United States* v. *Slutsky*, 514 F.2d 1222, 1225 (2d Cir. 1975).

None of these criteria was present in this case and the court so ofound. (App. 435-42). The "new evidence" alleged by Kavaler, *i.e.*, a more accurate version of Mrs. Silva's recollection, could have been developed by additional and more precise cross-examination. Moreover, it was not material to the factual issues—*i.e.*, whether Kavaler filed false claims against the government and conspired to do so—but only cumulative of evidence which tended to impeach Kavaler. Finally, on the total evidence of record in the case, even had the Government flatly conceded at trial that Kavaler did not work at Lee Avenue in 1972 or 1973—a position that would be absurd in light of the records showing that Kavaler paid rent for his amount amount until March, 1973—it is inconceivable that, in the face of overwhelming evidence that Kavaler had not provided the treatments he claimed, a different verdict would have been reached. It is likewise inconceivable that the jury would reach any different verdict after a new trial.

In response to all of this, Kavaler predictably attacks the conduct of the prosecutor. He begins with an insulting and irresponsible suggestion that the prosecutor may have testified falsely at the post-trial hearing when he said that Mrs. Silva had spoken with him only after his summation-in-chief. (Br. at 30). Suffice it to say that this new theory is contradicted not only by Assistant United States Attorney Wilson's sworn testimony at the

hearing, but also by his contemporeneous memorandum concerning the incident and by the affidavit of Agent Hartwig who was present at the meeting with Mrs. Silva. (App. 314, 381, 517). We would have thought that the fact that counsel below, Mr. Esbitt, saw no reason to suggest that the Assistant had testified falsely, would have indicated to Kavaler's new counsel that this idle suggestion of perjury could best have been withheld.

Relying upon cases holding that, when the Government knowingly permits perjury or fails to correct false testimony, a conviction must be reversed if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury," *e.g.*, *Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959); see also *United States* v. *Agurs*, 44 U.S.L.W. 5013, 5015 (U.S. June 24, 1976), Kavaler contends that his conviction must be reversed. The fault with this argument does not lie with Kavaler's correct recitation of an abstract of legal principle, but rather with his incorrect factual premise, *i.e.*, that Mrs. Silva had testified falsely.

Judge Brieant carefully examined Mrs. Silva's testimony and agreed with the Government that she had testified truthfully. Judge Brieant's conclusions, which are fully set forth in the appendix at pages 435-42, are not, as Kavaler blithely claims, in any sense erroneous.

Moreover, even if it were to be assumed *arguendo* that Mrs. Silva's earlier testimony had been false, Kavaler could not begin to show that there was any "reasonable likelihood" that this testimony "affected the judgment of the jury." As Judge Brieant found, and as we submit the Statement of Facts makes abundantly clear, the record could fairly be said to have reeked of Kavaler's guilt. Even with respect to the limited issue upon which Mrs.

Silva's testimony was relevant, that is, the recent vintage of the diary, there was, as Judge Brieant observed, an abundance of independent evidence showing that the diary was newly contrived. (App. 437-38).

It remains only to comment on the assertion that the prosecutor, after learning of Mrs. Silva's refreshed recollection, should have alerted the Court and defense counsel to Mrs. Silva's reappearance at the Courthouse. In retrospect, we agree that this would have been the better course. However, this inadvertent error of judgment can hardly be said to have affected the jury's delivery of a just verdict.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

GEORGE E. WILSON,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

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Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

George E. Wilson being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10th day of January, 1977 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Kostelanetz & Ritholz
80 Pine Street
New York, New York 10005

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

George E. Wilson

Sworn to before me this
10th day of January, 1977

Ira Block

IRA BLOCK
Notary Public, State of New York
No. 31-5348425
Qualified in New York County
Commission Expires March 30, 1978